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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-811

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Petitioners,

v.

ALLAN BAKKE,
Respondent,

On Writ of Certiorari to the Supreme Court of the State of California

BRIEF AMICUS CURIAE FOR NORTH CAROLINA ASSOCIATION OF BLACK LAWYERS

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BRIEF AMICUS CURIAE FOR NORTH CAROLINA ASSOCIATION OF BLACK LAWYERS

QUESTIONS PRESENTED

Two questions are presented to the Court for review in this case:

(1) Do applicable decisions of this Court require reversal of the judgment below, which declares unconstitutional the use of race as an explicit factor in a state professional school's special minority admission program?

(2) If they do, do reasons of constitutional policy require that these decisions be adhered to in this case?

Amicus deals integrally, but briefly, with each of these questions. But its chief concern is with the second question. Amicus especially delineates the probable consequences of the decision below, if affirmed, on the future education of Blacks and other minorities both in majoritarian and in predominantly Black law schools.

INTEREST OF THE AMICUS CURIAE

The attorney for the petitioners and the attorney for respondent have consented to the filing of this brief on behalf of the North Carolina Association of Black Lawyers under Rule 42.

The North Carolina Association of Black Lawyers is an unincorporated professional association composed primarily of Black and other minority lawyers and law teachers, located chiefly in the State of North Carolina. The Association also has a Student Division, comprised primarily of minority law students attending law schools in the State of North Carolina. The plurality of members of the Association are graduates of the North Carolina Central University School of Law, a State law school, located in Durham, North Carolina. The preponderance of the Black lawyers practicing in North Carolina are graduates of that predominantly Black law school.

The North Carolina Association of Black Lawyers has from its origin had special concern for the continued existence of the North Carolina Central University School of Law. This law school's primary mission is, and has been, to provide opportunities for Blacks and other minority and disadvantaged persons to pursue the study of law. In furthering its concern for the continued education of Black Lawyers in North Carolina, the North

Carolina Association of Black Lawyers has established a fund for student scholarships at the NCCU School of Law, and has sponsored, with considerable recent success, the needs of that law school for physical plant, materials, and faculty personnel.

A decision of this Court declaring unconstitutional the use of race as an explicit factor in professional school admissions could have a severe impact upon the possibility of educating Blacks, and other minority, lawyers in North Carolina, and presumably in other States, in professional schools that are now predominantly Black. This crucial factor is not apt to be brought before the Court by the respective parties, or by amici now known to us.

The North Carolina Association of Black Lawyers urges upon the Court that both the district court of California and the California Supreme Court erred in their disposition, and that the decision below should be reversed.

The basic issue, as we see it, is the constitutionality of the use of explicit racial factors permitting qualified Black, and other minority persons, limited special admission to predominantly white majority schools, where such special admission coincides with the nonadmission of qualified nonminority persons. The parties and other amici will undoubtedly sharpen this basic issue.

However, an indirect casualty of a decision of the Court that such use of explicit racial factors is unconstitutional could be the predominantly Black law (and possibly) medical school, the last resort of Black and other minority persons to secure education for these professions. The continuing high application rate of majoritarian applicants almost assures this consequence. We seek in this brief to bring to the attention of the Court the gravity of this by-product of affirmance, which none

could applaud. Whatever the outcome of the basic issue, the Court can obviate this calamity either as an immediate reality, or as an impending threat, by appropriate modulations of its opinion.

SUMMARY OF ARGUMENT

Respondent, Allen Bakke, claims that he has been denied admission to a medical school operated by petitioners on behalf of the State of California, in violation of the equal protection clause of the 14th Amendment of the United States Constitution. The California Court finds the special minority admission program unconstitutional upon the premise that race may not be used as an explicit factor in awarding admissions, where the effect is to deny a place in the medical school to another qualified person.

An effect of admitting minorities pursuant to a special admissions program is that others who might have otherwise secured admission, possibly including respondent, may not be admitted.

Certainly respondent has no right to admission to a state medical, or law, school unless he meets reasonable admission standards fixed by the professional school. However, he properly claims that he may not be excluded by the state on arbitrary or invidious grounds. The record contains no suggestion of arbitrariness. Hence the central question is whether an admissions program is constitutionally "invidious" which sets aside 16 of 100 seats exclusively for admittees selected on criteria which explicitly include race as a factor.

The Court's recent decisions in *Washington* v. *Davis*, 426 U.S. 229 (1976), and *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, —— U.S. ——, 97 S.Ct. 996 (1977), establish that petitioner's special minority admissions program is not "invidious." It is rather a

reasonable exercise of state power to achieve legitimate state objectives, which include fostering education of professional people, and making more likely a broad participation of minority persons in the major professions.

This Court has handed down no decision that supports respondent's position: its decisions in the *Davis* and *U.J.O.* cases point to a contrary result. The California Supreme Court wrote as if on a blank slate, noting, but not coming to grips with, the *Davis* requirement of "racially discriminatory purpose." But the *Davis-U.J.O.* precedents should effectively ground this Court's answer on this review—unless the Court now has second thoughts about these equal protection decisions after analysis of the specific interests identified in this case.

Amicus next addresses certain policy arguments (against permitting use of an explicit race factor in admissions) that were indicated by Justice Brennan in the *U.J.O.* case. The impact of affirmance upon the admission of Blacks, and other minorities, to majoritarian law schools is urged in the context of a March, 1977 survey of American law schools conducted by the North Carolina Central University Law School. Finally, amicus suggests a significant minority interest that could be seriously disadvantaged by affirmance here—the education of Blacks and other minorities, in law schools which have been traditionally predominantly Black.

ARGUMENT

I. THE RECORD IN THIS CASE SHOWS NO INVIDIOUS DISCRIMINATION AGAINST RESPONDENT —IN THAT HE HAS NOT BEEN EXCLUDED BY A "RACIALLY DISCRIMINATORY PURPOSE"

In *Washington* v. *Davis*, 426 U.S. 229 (1976), where Blacks charged that a District of Columbia police department recruiting test had a racially discriminatory im-

pact, the Court, through Justice White, explicitly ruled that "mere discriminatory impact" was not sufficient to establish an equal protection racial discrimination. There must be showing of "racially discriminatory purpose." 426 U.S. at 240. This carefully considered position of the Court was reemphasized this term in *Arlington Heights* v. *Metropolitan Housing Development Corp.*, —— U.S. ——, 97 S.Ct. 555 (1977), and the specific ingredients of a "racially discriminatory purpose" were made unmistakably clear in *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, —— U.S. ——, 97 S.Ct. 996 (1977), as those constituting "racial slur or stigma." 97 S.Ct. at 1009.

The design of the California special minority admissions program was that, as to 16 seats of 100, there should be explicitly racial criteria for admission. As to these 16 seats, it was planned, not accidental, that some applicants who would have been admitted on general admissions criteria, could not qualify. Respondent was not admitted. But this was not because he was Bakke, nor because he was Italian, or White Anglo-Saxon Protestant, or Jewish, or Catholic, or eastern European. There was no explicit attempt to *exclude* respondent, or anyone else, so far as the record shows, because of who or what he was—for demeaning reasons, casting stigma on him. His nonadmission was simply a necessary consequence of the positive reservation of 16 seats for specially qualified students.

The California Supreme Court has held that this special minority admissions test violated equal protection because as to Bakke it was not "benign."

Under the *Davis-U.J.O.* formulation, the Supreme Court has set a very different standard to test equal protection constitutionality: "Was the classification invidious to this respondent?" On the record now before the Court, the answer is a clear "no."

In the *UJO* case, New York State sought to satisfy the Attorney General that its planned redistricting complied with Section 5 of the Voting Rights Act of 1965. Allegedly in order to do so, the state used racial criteria to establish substantial non-white majorities in two particular assembly districts and two senate districts. To achieve the desired 65% of minority voters in these districts, the state's 1974 redistricting legislation split a closely-knit community of 30,000 Hasidic Jews (who previously voted together in one senate district and one assembly district) into two senate and two assembly districts. The Jewish community sought a declaratory judgment that the legislation "would dilute the value of each plaintiff's franchise by halving its effectiveness solely for the purpose of achieving a racial quota and therefore [was] in violation of the Fourteenth Amendment." The district court denied relief.

This Court affirmed, 7-1 (Justice Marshall not participating.) The Court considered both constitutional and statutory bases for the challenged legislation. The dominant opinion of Justice White found that the New York statute was constitutionally permissible under Section 5 of the Voting Rights Act, and that it was permissible under the equal protection clause (without considering the Voting Rights Act).

Our interest here is the equal protection aspect. The Court in *U.J.O.* recognized that "the state deliberately used race in a purposeful manner" in its redistricting plan. However, the opinion distinguished between purposeful use of a racial criterion and what the Court called "discriminatory purpose." Since the state's plan "represented no racial slur or stigma with respect to whites or any other race . . . we discern no discrimination violative of the Fourteenth Amendment . . . ." 97 S.Ct. at 1009-10.

It is hard to put the matter more clearly. Interestingly, while a majority of the Court subscribed to the

above equal protection position, only four Justices accepted the portion of the opinion that upheld the New York statute because of power derived from the Voting Rights Act. Justices Stevens and Rehnquist expressly joined in the equal protection part of Justice White's opinion, while Justices Stewart and Powell, in a separate concurrence, indicated agreement with the equal protection views set out above:

> Under the Fourteenth Amendment the question is whether the reapportionment plan represents purposeful discrimination against white voters. Washington v. Davis, 426 U.S. 229 (1976). . . . That the legislature was aware of race when it drew the district lines might also suggest a discriminatory purpose. Such awareness is not, however, the equivalent of discriminatory intent. The clear purpose with which the New York Legislature acted . . . forecloses any finding that it acted with the invidious purpose of discriminating against white voters. 97 S.Ct. at 1017.

It seems clear, then, that the Court has most recently, and most explicitly, answered that petitioner's conduct herein is not invidious as to respondent, and on present law a reversal should follow.

II. CONCERNS OF CONSTITUTIONAL POLICY DICTATE ADHERING TO THE PRINCIPLES ENUNCIATED IN *DAVIS-UJO* AND REVERSING

So widespread is the concern with the special minority admissions problem that the Court will certainly address itself to policy questions, to see if reexamination, or qualification, of the equal protection doctrine enunciated in *Davis-U.J.O.* is required. However, the overwhelming weight of policy arguments calls for adherence by the Court to its *Davis-U.J.O.* analysis of "purposeful racial discrimination" under the equal protection clause. Because general policy concerns will be dealt with in other briefs, amicus will note them but briefly, and in the context of specific questions raised by Justice Brennan in *U.J.O.*, and then concentrate on two special policy concerns: (1) the impact of an affirmance on Black entry into the legal profession, and (2) the possible destructive impact of affirmance on education of minority students in predominantly Black law schools.

A. General policy concerns.

Concurring in *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, —— U.S. ——, 97 S.Ct. 996 (1977), Justice Brennan addressed specific objections to the use of what he called "benign discrimination." While we do not believe that frequently used term illumines the question now before the Court, Justice Brennan's concerns suggest that certain policy issues, among the many that have been advanced in the long debate on special minority admissions, seem particularly significant to him, and perhaps to other justices. For this reason we address them here.

1. *Apparently "benign" treatment may in fact have illicit, rather than truly benign, purposes. (97 S.Ct. at 1013).*

Some disadvantaged groups might be preferred at the expense of others, as where a program in Texas might favor Mexican-Americans at the expense of Blacks or Indians, and a program in Ohio might favor Blacks at the expense of Puerto Ricans. The possibility of illicit discriminatory purpose is present once a preferential minority program is permitted; that must be conceded. But this should not be taken as a ground for eliminating benefits to all minorities. The difficult problem of line-drawing could well be left to the states, saving the federal equal protection right to complain when a demon-

stration of illicit purpose, as well as effect, can be made. *Washington* v. *Davis*, 426 U.S. 229 (1976), *Arlington Heights* v. *Metropolitan Housing Development Corp.*, —— U.S. —— 97 S.Ct. 555 (1977).

> 2. ***"Preferential treatment may act to stigmatize its recipient groups [and] imply to some the recipients' inferiority and especial need for protection." (97 S.Ct. at 1014).***

One must deal with this objection with great care. The words "stigmatize" and "inferiority," as used here, are in particular need of clarification, in the context of the legal history of race relations in the United States. After the rocky history from the *Civil Rights Cases*[1] and *Plessy*,[2] to *Brown*,[3] we seem to have emerged in our law to the position that the richness and worth of each human person, and his or her superiority or inferiority, are measured not by race, not by economic resources, and not by educational qualification. When working people were in "especial need of protection," many fought for, and accepted, the governmental sanction of protected unionization. To this day, some working people do not see this as a "benefit," and do not want it. Yet they may be subjected to "majority rule." Undoubtedly some Blacks, Hispanic-Americans, and Indians do not want special treatment, some possibly on the grounds cited in this objection. But when governmental policy decides that past deprivation has made present special treatment an instrument of effective personhood and citizenship, some individual costs are inevitably present.

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[1] 109 U.S. 3 (1883).

[2] *Plessy* v. *Ferguson*, 163 U.S. 537 (1896).

[3] *Brown* v. *Board of Education*, 347 U.S. 483 (1954).

> 3. ***It is a "social reality that even a benign policy of assignment by race is viewed as unjust by many in our society, especially by those individuals who are adversely affected in a given classification." (97 S.Ct. at 1014).***

As a social reality, this objection has force. But it is hardly solid stuff from which to fashion a constitutional barrier to a program. Objectors may well bring political, and legal, pressures to bear in their states against instituting and continuing special minority admission programs. The minorities may bring similar pressure to bear in support of such programs. The minorities will not have comparable recourse if a constitutional red light terminates the possibility of such program. The green light simply leaves to the states an ongoing judgment. Employers, as a group, were adversely affected by national labor policy that required them to deal with recognized labor unions. The progressive income tax fell especially on a particular group of economically advantaged. Like those who would be disadvantaged by special minority admissions, these hard-hit groups were left with possibility of repeal as the only further avenue of objection. It is a "social reality", but, independent constitutional basis apart ("invidiousness", "arbitrariness" or nonrationality), this plight is simply the democratic process at work in a federal system, within truly constitutional limits.

At any event, if some perceive the use of an explicit racial factor in professional school admissions as giving an "impression of injustice" (97 S.Ct. at 1014), clearly others, for example, the overwhelming bulk of the legal education community (cf. Appendix A) see it as the quintessence of justice. There is admittedly a measure of tension on this point. But tension is one thing, ground for erecting a constitutional barrier is another.

Perception apart, it must be kept in the forefront that the issue at stake does not pit qualified against unqualified. It concerns the acceptable methods of establishing criteria for selecting some from among the many qualified. As amicus points out in the next section, the legal education community has opted for a two-track method: the LSAT-GPA route for general admissions, and a special admissions route for minorities. The survey data that follows should illuminate objective reasons why they have done so. Clearly not to stigmatize those either included or excluded, nor to wreak injustice on anyone.

B. Adverse Impact of Affirmance on Black Participation in Legal Profession.

There is fresh evidence that affirmance of the California judgment would wreak havoc upon the gradual, but still laggard, efforts to give Blacks and other minorities a place in the legal profession proportionate to their numbers and capabilities. American law schools have continued to adhere to standardized forms of admissions—the LSAT test and GPA rating. However, by establishing special admissions procedures to bring *qualified* minority candidates to the law schools, the threshold of the legal profession, they have in practical effect recognized that these standardized tests do not adequately measure the special capacities of minority candidates. The California court itself suggests this may be so, but it declines to face squarely the fact that the very cultural qualities that underly special admissions programs will make Blacks and other minorities particularly effective advocates, counselors and leaders for the racial and ethnic groups of which they are members. One may agree or disagree that the LSAT and GPA route is the best available admissions formula for beneficiaries of traditional majoritarian education. Either way, one must endorse the companion judgment of the

law teaching profession that it is a disaster as a test for minorities.

In March 1977 the North Carolina Central University Law School conducted a survey of American law schools to test the likely effect of eliminating the present two-ply system which combines LSAT-GPA (for general majoritarian admissions) and special admissions qualifications (for minorities). What would happen if there was just one side of the coin—and everyone had to qualify under the standardized LSAT-GPA tests? The NCCU survey posed a single question: "How many actual minority admittees would probably have qualified for admission on your general admission standards if there had been no preferential admission plan?" The question is much like the one independently asked by the Law School Admissions Council which we understand will be discussed in its brief in this case. But the NCCU survey, unlike LSAC, asked for information over a five-year period. The answers from the 43 reporting schools yield illuminating data that justifies discussion here, and fuller treatment in Appendix A.

National admission statistics compiled by the American Bar Association from its Annual Law School Questionnaires are a useful backdrop to the NCCU Survey (See Appendix A, p. 1a).

	Total National 1st Year Law School Enrollment	Black 1st Year Enrollment	% Black 1st Year Enrollment of National Total
1976-77	39,996 (164 schools)	2,128	5.1%
1975-76	39,038 (163 schools)	2,045	5.2%
1974-75	38,074 (158 schools)	1,910	5%

The NCCU survey data gives startling insights to two ways of looking at the admissions problem for minorities once they are compelled to function within the prevailing general admissions (LSAT-GPA) criteria. What percentage of the total 1st year law population would Blacks,

for example, constitute if uniform general admissions requirements were imposed? Considerably less than 1%. This in a nation where the Black population approximates 11%. What percentage of Black 1st year law students would have been admitted if there were but one admissions route—general admissions (LSAT-GPA)? Only 11-12%. This in a nation where the Black participation in the legal profession is the admittedly unsatisfactory 2% of the total lawyer population.[4]

The accompanying summary presentations of Charts I and II (which are fully set out in Appendix A) give the picture at a glance.

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[4] One cannot shrug these figures off by suggesting, as does the California Supreme Court, following Mr. Justice Douglas in *DeFunis v. Odegaard*, 416 U.S. 312 (1974), that some other "non-racial" way must be found to deal with the problem. Four years after *DeFunis* those charged with responsibility for admission to legal education remain convinced that the LSAT-GPA route most satisfactorily predicts majoritarian potential (See Appendix A, p. 4a), and that other approaches are necessary to select among qualified minority candidates—these students are most accurately identified for this purpose by racial and ethnic cultural categories, i.e. special minority admission programs.

Chart I (Summary Form)

Effect of Elimination of Special Minority Admissions: Black Students in Total Entering Law Classes, 1972-1976

1976-77			1975-76			1974-75			1973-74			1972-73		
A.	B.	C.	A.	B.	C.	A.	B.	C.	A.	B.	C.	A.	B.	C.
10,639	11,656	80	8448	9196	72	8357	9125	64	6511	7010	42	5159	5432	33
.0075%	.0069%		.0085%	.0078%		.0077%	.007%		.0065%	.006%		.0064%	.0061%	
(42 Schools)			(35 Schools)			(34 Schools)			(28 Schools)			(22 Schools)		

Interpretation: In 1976-77 if special minority admissions programs were not used (but the prevailing variations of LSAT-GPA ratings) there would have been only 80 Black students enrolled in the 1st year class in the 42 law schools covered by these computations. The total 1st year enrollment in these schools (column A) is computed by deducting from the actual enrollment all minorities benefited by the special minority admissions plan (except the 80 who would be admitted even without the special minority program). The figures in Column B represent the actual total enrollment in these schools without the deduction of minorities. Either figures (Columns A or B) are arguably appropriate. Column A assumes that the vacancies now filled by enrollees benefiting from special minority admissions would *not* be filled by others if special minority admissions were eliminated. Column B assumes that they would be. It seems that Column A represents the statistically more conservative figure. (As will be seen in Appendix A, the sample becomes less impressive as the participating schools descend from 42 to 22. But it still has a large claim to respect.)

Combining 1976-77, 1975-76, and 1974-75 into a 3-Year Total, there would have been 216 Black students admitted to entering classes in those years out of a total 1st year enrollment in the participating schools of 27,444. That is, 78/100 of 1% of entering law students would have been Black, as compared to the present 2% Black representation in the national lawyer population, and 11% in the total population. (This 3-Year Total uses the figures from Column A).

Chart II (Summary Form)

Effect of Elimination of Special Minority Admissions: Hypothetical vs Actual Black Law School Enrollment, 1974-1976

1976-77	Three-Year Period (1974-76)
78/697	171/1383
11.19%	12.36%
(41 Schools)	(31 Schools)

Interpretation: In 1976-77 if special minority admissions programs were not used (but the prevailing variations of LSAT-GPA ratings), instead of the 697 Black students actually enrolled in the 1st year class in the 41 law schools covered by these computations, there would have been only 78 Black law students enrolled. This constitutes but 11.19% of those Black students actually enrolled in 1st year law classes that year in those schools (The Three-Year Total comes to 12.36% in 31 law schools. The full chart is in Appendix A.)

The above summary of Chart I tells the first part of the story. In 1976-77 there would have been only 80 Blacks entering 42 reporting law schools that enrolled 11,656 1st year prospective members of the bar. The Blacks were, therefore, only ¾ of 1% (.0075%) of the total entering law students. The methodology of the NCCU survey (set out in Appendix A) demonstrates that these figures are solidly representative, because the reporting law schools constitute an unusually precise sample of the universe of American legal education. In 1975-76 there would have been only 72 Blacks among 8448 entering law students. (.0085%); in 1974-75 only 64 out of 8357 (.0077%); in 1973-74 only 42 out of 6511 (.0065%); and in 1972-73 only 33 out of 5159 (.0064%). In the three-year period from 1974-76 only 216 Blacks would enter these law schools out of 27,444

(.0078%). Extrapolating this figure against the total 1st year nation-wide law enrollment for these three years of 117,108, there would have been a total of 913 Black law students entering, an average of 304 for each year. These last figures include those admitted to the four predominantly Black law schools, discussed at p. 18, *infra*.

The same story may be told in another way by comparing the number of Blacks *actually* admitted with those who *would have been* admitted if they had been forced to run the general admissions (LSAT-GPA) gamut. The above summary of Chart II (which, like Chart I, is fully set out in Appendix A) makes this point—that without special minority admissions only 11.19% of the Blacks actually enrolled would have been given a seat in law school. And, instead of the 1383 Black 1st year law students who did enter the reporting schools in the three-year period 1974-1976, only 139 (12.36%) would have answered the first roll call in torts—if uniform general admission standards using prevailing LSAT-GPA criteria were enforced. Comparable results ensue when the NCCU survey addresses the standpoint of Indians, Hispanic-Americans, and other minorities whose hypothetical fate was similarly tested.

The law schools (and their problem parallels medical and other professional schools) have, after years of reflection, opted for the LSAT-GPA as the preferable route for general admissions. But they have also recognized that special admissions for minorities is an indispensable parallel track if law schools are to admit the best qualified candidates. Best qualified, in the sense of fairness to individuals, to identifiable groups from which they come, and to the states and nation which want qualified and congenial legal representation and medical care for all citizens. There is affirmative policy ground here to stand by *Davis-U.J.O.*

At a time when dissatisfaction is widely shared that Black attorneys constitute only 2% of the lawyer population, the prospects of a yearly increment that is less than 1% gives grave cause to fear the consequences of affirmance of the California court. Among the many social concerns stressed by the litigants and the courts in this case, not the least is that for the 11% Black portion of the national population to operate within the American legal system it is necessary that there be Black lawyers. Even assuming that other arrangements could be made, short of using race as a factor, to avert the calamity of practical exclusion, it is not in the spirit of recent decisions of this Court to force educational and state authorities to substitute one reasonable alternative (their first choice) with another—short of arbitrariness or invidiously discriminatory purpose.

C. Probable Impact of Affirmance on Predominantly Black Schools.

In the United States there are now four predominantly black law schools, at Howard University in Washington, D.C., North Carolina Central University in Durham, North Carolina, Southern University, Baton Rouge, Louisiana, and Texas Southern University, in Houston, Texas. Although the problem under discussion here relates to all these schools, North Carolina Central University School of Law is a paradigm case with which the North Carolina Association of Black Lawyers is most familiar.

The special minority admissions programs have been a great advantage to Blacks and other minorities in recent years, opening up admission possibilities at a wide range of schools which would have been practically closed to all but a small number of them. Such programs at majoritarian schools furnish, in many cases,

the added advantage, stressed long ago by this Court,[5] of wide-ranged contacts in student years that ripen in later days as professional relationships. Nevertheless, for some time at least, adequately to educate Blacks and other minorities there will be need for some professional schools that specially accommodate their needs, interests and talents. Perhaps most important of all, such schools will be open to significant numbers of Black, and other minority, persons. The predominantly Black law school is presently a realistic necessity. While this Court is not the forum in which to propose creation of such schools, we may alert the Court against a new constitutional rule that would seriously damage, if not eradicate, the predominantly Black schools already in existence. The historical economic situation of Blacks, Indians, and Hispanic-Americans, has not permitted establishment of private institutions of professional education. These minorities are dependent on the state and national governments for educational institutions and their financial support. The operations and policies of these predominantly Black schools are, thus, like other state universities, under state management, and properly subject to the give-and-take of the political process. The states have often been alert to the public need that is filled by these predominantly minority institutions. The legal professional associations, notably the American Bar Association, the Association of American Law Schools, and state professional groups such as North Carolina Association of Black Lawyers, have fought to improve these schools, and to make them viable agencies for minority education. These schools have been integrated. Indeed as demand for law school seats has swelled in recent years, the schools have had increasing applications from, and increased enrollment by, majoritarian students. In the case of North Carolina Central University School of Law,

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[5] *Sweatt* v. *Painter*, 339 U.S. 629 (1950).

the percentages in recent years of white students have been

1970	20.8%
1971	21.24%
1972	28.57%
1973	37.55%
1974	35.21%
1975	38.25%
1976	39.59%

If applicants were admitted on LSAT and GPA averages alone, without consideration of the special mission of NCCU Law School with respect to educating minorities, the majoritarian percentage would have been much higher. The North Carolina state legislature and University system, responsive to the pleas of amicus and others, have increased funds to improve the quality of education given, the facilities, the faculty, the library, etc. As such improvement takes form, as it is now doing, what would be the impact of a constitutional rule that prevents the predominantly Black (or other minority) law school (or medical school) from explicitly considering race as one factor in admissions? It is plain that given continued general demand for legal training, such a rule would shortly convert the once predominantly Black minority school to a predominantly white majoritarian school.

The North Carolina Association of Black Lawyers sees this policy consideration as giving strong support to a reversal of the decision below. The mix formula in the predominantly Black school could then be worked out by the political process, in light of state needs and conditions. On the other hand, if the Court should affirm herein, this special policy situation of the predominantly Black law school should be accommodated by the Court's opinion. A specific qualification could be made excepting any college or professional school which by history, tra-

dition, and mission has been significantly committed to work with a predominantly Black or other minority group. Such an exception would not be only justifiable, but required. For a belated national conversion to "color-blindness" should increase, rather than lessen, the realistic opportunities of education for full citizenship of Black and other minority persons.

CONCLUSION

For the reasons stated above, this Court should adhere to the conclusions reached in *Washington* v. *Davis* and *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, that a racially discriminatory purpose is required for state action to be invidiously discriminatory under the equal protection clause of the Fourteenth Amendment. Finding no evidence in the record of invidiously discriminatory action by petitioners against respondent, the Court should reverse the judgment below.

In the event of any other disposition of this case, the Court should make clear the inapplicability of any ban on the use of racial factors in admission to professional schools that have been historically and traditionally predominantly Black, or predominantly dedicated to the education of some other minority racial or national group.

Respectfully submitted,

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Dated: June 2, 1977

CERTIFICATE OF SERVICE

I, Joseph A. Broderick, a member of the Bar of this Court and counsel for North Carolina Association of Black Lawyers, hereby certify that I have this 2nd day of June, 1977, caused three copies of the foregoing Brief Amicus Curiae for North Carolina Association of Black Lawyers to be mailed, with first class postage thereon prepaid, to counsel for petitioners, The Regents of The University of California, and to counsel for respondent, Allan Bakke. I further certify that all parties required to be served have been served.

JOSEPH A. BRODERICK

APPENDIX

APPENDIX A

NORTH CAROLINA CENTRAL UNIVERSITY LAW SCHOOL SURVEY, March, 1977 *

1. Design of Survey—

The NCCU survey expressly builds upon the extensive statistical report on minority group enrollment data in American law schools by James P. White, Consultant on Legal Education to the American Bar Association (MEMORANDUM QS7677-9, dated January 18, 1977, hereinafter called ABA Report.) This report compiles the minority group student enrollment of individual law schools for each year from 1971 to 1976 under six specific minority categories. In addition, it has a valuable compilation table of each minority group for each year since 1969-70, broken down by year of law school study.

The NCCU survey referred to the ABA Report and asked a single question: "How many actual minority admittees would probably have qualified for admission on your general admission standards, if there had been no preferential admission plan?" Replies were requested for five years, from 1972 to 1976, under four minority headings—Blacks, Hispano-Americans (including Mexican-American and Puerto Rican), Indian and "other (please identify)". A final column asked for "Total 1st Year Admissions." The survey was sent to 131 law schools, the law schools listed in the ABA Report that had indicated admitting blacks and other minorities, with the exception of the four predominantly Black law schools. A comparable survey was sent to 120 medical schools.

2. Response to NCCU Survey—

As soon as the NCCU Survey was sent out it became apparent that it had crossed in the mail with the Law

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* Account of survey taken from forthcoming issue of *North Carolina Central University Law Review*.

School Admissions Council survey asking substantially the identical question. However, it proved crucial that LSAC had inquired only with respect to the single year 1976-77. For, unexpectedly (in face of the competition), there were substantial returns to the NCCU law school survey. By contrast the NCCU medical school survey returns were insufficient to justify compilation.

Some early replies to the NCCU law school survey had begged off on grounds that it "crossed with a similar request from the Law School Admission Council." Others pointed out "that we have recently sent out a similar form, but of a more confidential nature" to LSAC. But with the Supreme Court's grant of an extension for filing briefs the tide turned and the final net was a 40% response. In the circumstances this compared favorably with the 51.9% response from law schools to the recent Cartter Report on "The Leading Schools of Education, Law and Business." (See *Change*, February 1977, pp. 44-48).

Of the 40% replying, 32 percent (43 law schools) furnished data that was responsive to the questions asked and constitutes the main data upon which are based the survey's conclusions. [These are set out at pp. 15-17 of this brief.] Supplemental connecting data derived from the ABA Report is explained below.

3. Reporting Law Schools Constitute a "Fair Sample."

The 40% return, and the 32% data-furnishing response, are highly satisfactory in the circumstances. But since they are considerably less than 100% completeness one fairly inquires whether those reporting constitute a "fair sample" of American law schools, so that the conclusions reached may be taken as representative of the views of American law schools as a whole. Were it possible to identify the reporting schools by name it would be clear that these schools constitute a representative cross-section of American legal education institutions.

However the NCCU survey specified that data would be treated on a confidential basis by law schools requesting confidentiality, and most did. While maintaining the promised confidentiality the reporting schools may be still adequately placed in reference to the universe of American law schools by considering three factors: geographical distribution, public or private character, and level of academic repute. The first two may be dealt with straightaway, the third requires consideration of two independent studies.

The 43 law schools reporting usable data cover 26 states: 21% from the New-England-Middle Atlantic area, 22.5% from the South, 37% from the Middle West, 16% from the Far West (Trans-Rocky Mountains). 44% of these schools are public, and 56% private. Only one of the 43 reporting schools said simply: "Don't know."

Moving to the level of academic repute, among the data-furnishing law schools are five which are ranked among the top 15 American law schools in the recent Carrter Report (cited above). However a representative sample is not assured by the mere presence of excellence. To establish the validity of the sample from the vantage point of the standing of the schools reporting we refer to the "Law School Locator 1976-77" prepared by the University of Rochester to "help the student find a set of appropriate law schools, given that student's grade point average and LSAT score." This study classifies law schools under 13 headings (A to M). Law Schools with highest admission requirements are classed in A (LSAT 700+, GPA 3.75-4.00) and B (LSAT 700+, GPA 3.50-3.74). Succeeding letters represent lower admission requirements down to M (LSAT 500-549, GPA 2.75-99). Within these letters, A to M, are included 145 law schools. A final category lists 18 "schools with no information available this year."

For greater simplicity we consolidate the 13 A-to-M headings into five couplings based on LSAT, and ask how the NCCU reporting schools fall into these five coupled headings as compared with how the Rochester universe of 145 law schools fits within the same coupled headings. The following chart shows how remarkably closely the NCCU distribution tracks the proportions of the de facto classification based on admission requirements of the Rochester survey. This correspondence effectively establishes the validity of NCCU's 43 reporting schools as a "fair sample" of the American law school universe.

	LSAT	Rochester Distribution (145 schools)	NCCU Distribution: Reporting Schools (43)
A-B	700+ 2*/8	5.5%	4.8%
C-D	650+ 13/31	21.4%	31%
E-F-G-H	600+ 19/66	45.5%	45.2%
I-J-K	500+ 8/37	25.5%	19%
L-M	500+ 0/3	2%	0%

The top line of the above chart expresses that in the combined categories A and B of the Rochester reportage, law schools require 700+ LSAT for admission. Two of the NCCU reporting schools fit into this coupling, out of the total of eight schools listed by the Rochester report as having this requirement. This category A-B includes 5.5% of the 145 schools constituting the Rochester classifiable universe. The category also constitutes 4.8% of the reporting schools in the NCCU survey. A comparable correspondence is seen in the largest category, E-F-G-H. The other categories are less identical in correspondence, but still remarkable. (The "unclassified" schools in the Rochester report are 18; one of the NCCU schools is on this list. This factor has been left out of the above com-

* NCCU schools here total 42; the 43rd was unclassified.

putations as not significant.) See Chart III, *infra*, for correction of NCCU sample for lower participations of reporting schools.

4. Supporting Data from ABA Report—

Some reporting schools did, and some did not, list the total Black admissions in each given year. When they did there was no need to look elsewhere. Where they did not, the data were supplied from the ABA report, by averaging the minority total attendance figures for three years, dividing by three to secure a 1-year factor, and adding 20%. This 20% factor is justified by conclusive data in Table A of the ABA report, which shows a decline of 20% from Black 1st year enrollment to Black attendance in 2nd and 3rd year of law school. Incidentally, this is not simply a reflection of academic deficiency. As one reporting school pointed out, "We experience a significant amount of attrition among Black students who are very well qualified for us but who are affirmatively acted upon at other schools." Other schools commented on other grounds for the attrition. The point must be stressed that all candidates admitted, by general or by special minority admission programs, are certified as qualified to aspire to professional work in a particular school, by the specialists on the scene who are best qualified to make that judgment. To date most law schools have made their admissions choices within the two-track system of general admissions (LSAT-GPA, see discussion of Rochester Locator, *supra*) and special minority admissions.

CHART I

	1976-77			1975-76			1974-75			1973-74			1972-73		
	A.	B.	C.	A.	B.	C.	A.	B.	C.	A.	B.	C.	A.	B.	C.
1.	241	254	2	241	255	2	257	268	4	219	233	2	240	253	2
2.	169	183	0	166	180	2	147	160	3	166	180	2	166	180	2
3.	199	230	1	186	215	2	182	215	1	174	208	0	166	198	2
4.	307	357	0	312	362	0	310	359	2	265	316	1	283	331	4
5.	246	254	3	300	309	1	292	303	0	268	278	1	318	324	3
6.	200	200	12	199	190	9	179	180	12	178	180	8	—	—	—
7.	167	182	0	166	183	0	154	172	0	118	137	0	179	197	0
8.	186	190	1	187	190	2	185	190	1	195	200	1	195	200	1
9.	221	236	2	222	238	1	222	238	2	223	239	1	211	228	1
10.	445	456	4	431	453	3	421	443	5	398	423	5	—	—	—
11.	460	525	2	380	525	2	377	525	1	—	—	—	—	—	—
12.	519	625	0	—	—	—	—	—	—	—	—	—	—	—	—
13.	208	275	1	—	—	—	—	—	—	—	—	—	—	—	—
14.	478	527	1	—	—	—	—	—	—	—	—	—	—	—	—
15.	434	437	3	429	434	2	408	423	3	349	371	2	337	355	4
16.	160	163	0	161	161	0	155	155	0	155	155	0	—	—	—
17.	174	207	0	175	198	0	175	195	0	174	197	0	—	—	—
18.	280	293	1	302	314	2	314	327	0	324	324	0	324	248	0
19.	217	223	0	184	189	3	190	195	0	188	191	0	190	188	1
20.	139	141	1	127	129	1	147	150	0	158	161	0	107	110	0
21.	154	165	0	—	—	—	—	—	—	—	—	—	—	—	—
22.	215	227	0	149	160	0	158	184	0	147	152	4	—	—	—
23.	125	151	0	124	149	0	135	158	0	153	175	0	124	150	0
25.	198	211	2	202	209	2	252	270	1	—	—	—	—	—	—
27.	169	288	0	264	285	0	247	269	0	279	299	0	267	289	0
32.	453	468	1	436	449	0	406	418	0	413	427	1	338	350	0
33.	374	395	0	366	386	1	268	292	1	—	—	—	—	—	—
34.	492	508	0	482	497	0	501	517	0	443	459	0	420	436	0
35.	141	145	0	136	140	0	141	145	0	133	140	0	142	145	0
42.	284	302	0	251	269	0	270	296	2	237	256	0	244	258	1
43.	238	248	4	221	226	3	—	—	—	—	—	—	—	—	—
44.	229	241	21	212	238	24	212	237	17	214	238	12	198	211	12
45.	124	138	0	—	—	—	—	—	—	—	—	—	—	—	—
46.	103	115	2	—	—	—	—	—	—	—	—	—	—	—	—
48.	238	266	1	217	250	0	245	261	0	224	249	2	—	—	—
51.	208	208	2	146	148	0	219	219	1	—	—	—	—	—	—
52.	227	306	0	268	342	0	288	362	1	256	335	0	277	356	0
53.	216	225	1	211	221	0	207	217	0	223	233	0	215	225	0
54.	296	298	3	—	—	—	—	—	—	—	—	—	—	—	—
55.	212	298	1	215	292	2	269	284	2	—	—	—	—	—	—
56.	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—
57.	154	154	3	154	160	3	154	158	4	—	—	—	—	—	—
58.	237	251	0	231	249	0	235	250	1	237	254	0	233	250	0
	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—
	* 10,639	11,656	80	8448	9196	72	8357	9125	64	6511	7010	42	5159	5432	33
	.0075%	.0069%		.0085%	.0078%		.0077%	.007%		.0065%	.006%		.0064%	.0061%	
	(42 schools) **			(35 schools)			(34 schools)			(28 schools)			(22 schools)		

* For *interpretation* see Brief, p. 15.

** For evaluation of sample see Appendix A, p. 4a, and for correction of sample for lower participation see Chart III, *infra*.

Chart II

1976-77	3 yrs (1974-77)		1976-77	3 yrs (1974-77)
1. ——	——	31.	0/17	0/51
2. 0/15	4/55	32.	1/11	1/36
3. 1/22	4/66	33.	0/17	2/52
4. 0/40	2/121	34.	0/14	0/41
5. 3/9	4/26	35.	0/2	0/5
6. 12/12	33/36	42.	0/13	2/39
7. 0/12	0/35	43.	4/11	——
8. 1/5	4/15	44.	21/45	62/134
9. 2/17	5/52	45.	0/13	——
10. 4/11	12/34	46.	2/16	——
11. 2/22	5/50	48.	1/15	1/44
12. 0/69	——	51.	2/2	3/4
13. 1/48	——	52.	0/34	1/102
14. 1/39	——	53.	1/7	1/21
15. 3/11	8/34	54.	3/8	——
16. 0/2	0/6	55.	1/32	5/96
17. 0/22	0/70	56.	——	——
18. 1/11	——	57.	8/17	——
19. 0/4	3/15	58.	0/11	1/34
20. 1/3	1/9		——	——
21. 0/8	——		*78/697	171/1383
22. 0/8	2/35			
23. 0/7	0/22		11.19%	12.36%
30. 2/15	5/43		41 schools**	31 schools

* For interpretation see Brief, p. 16.

** For evaluation of sample see Appendix A, p. 4a, and for correction of sample see Chart III, *infra*.

CHART III

Correction of Sample for Lower Participations (See 3, above)

	Rochester (145 schools)	1976-77 (41)	1975-76 (35)	1974-75 (34)	1973-74 (28)	1972-73 (22)
A-B	5.5%	4.9%	2.9%	2.9%	0	0
C-D	21.4%	31.7%	34.3%	35.3%	35.7%	31.8%
E-F-G-H	45.5%	46.3%	45.7%	44.1%	46.4%	54.6%
I-J-K	25.5%	17.1%	17.1%	17.7%	17.9%	13.6%
L-M	2%	0	0	0	0	0